Date: July 17, 1996
Case No.: 95-INA-00017

In the Matter of:

HIGH CLASS,
Employer

On Behalf Of:

AZADOUHI ABRAHAMIAN,
Alien

Appearance: Neville Asherson, Esq.
For the Employer/Alien

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On December 3, 1993, High Class ("Employer") filed an application for labor certification to enable Azadouhi Abrahamian ("Alien") to fill the position of Secretary (AF 52). The job duties for the position are:

> Answer telephones, give information to callers, read & route mail, take dictation and shorthand, compose and type letters. 60 wpm.

The requirements for the position are completion of high school and two years of experience in the job offered. Other Special Requirements are to do word processing, and must speak Armenian which will be used on the job 80% of the time.

The CO issued a Notice of Findings on February 17, 1994 (AF 45), proposing to deny certification on the grounds that the Alien failed to include all jobs held during the past three years on her application in violation of 20 C.F.R. § 656.21(a), and the foreign language is a restrictive requirement in violation of § 656.21(b)(2)(i)(c).

Accordingly, the Employer was notified that it had until March 24, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated April 11, 1994 (AF 14), the Employer contended that the Alien did list the last place she was employed which ended in 1990, and has not worked since that time. The Employer further stated "95% of our customers are ethnic Armenians. The majority of them are recent immigrants who do not speak English, . . . the information the Secretary is to provide must be communicated in their native language." The Employer stated that the language

[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

requirement is a business necessity and is essential for the Secretary to perform her job duties in a reasonable and effective manner.

The CO issued the Final Determination on May 3, 1994 (AF 9), denying certification because the Employer, and not the Alien, made assertions regarding the Alien's employment status in the last three years, and because the Employer's rebuttal fails to comply with the requirements of the NOF in that it does not document that a substantial portion of its business is conducted in Armenian.

On June 3, 1994, the Employer requested review of the denial of labor certification (AF 2). The CO denied reconsideration on June 14, 1994, and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* ("DOT"), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

To establish business necessity for a foreign language, the two-prong standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc*) is applicable. See also, *Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (*en banc*). The first prong generally involves whether the employer's business includes clients, co-workers, or contractors who speak a foreign language, and what percentage of the business involves the foreign language. The second prong focuses on whether the employee's job duties require communicating or reading in a foreign language.

In the instant case, the CO correctly found that the Employer's requirement of the ability to speak Armenian was unduly restrictive as it is not normally required for the position of Secretary under the guidelines of the *Dictionary of Occupational Titles*. The CO notified the Employer that it must establish the business necessity of the requirement by providing documentation that a substantial portion of its business is conducted in Armenian, and that a non-Armenian speaking individual could not perform the job (AF 49).

The Board has held that an employer's clients' preference to do business in a foreign language supports a finding of business necessity where the employer has established that it would lose a significant portion of its business. See *Mr. Isak Sakai*, 90-INA-330 (Oct. 31, 1991); *Raul Garcia, M.D.*, 89-INA-211 (Feb. 4, 1991); *Jung Gil Choi, C.P.A.*, 88-INA-254 (Mar. 27, 1990). However, in all those cases the employers established that the foreign language requirement had a direct bearing on the nature of their respective businesses (*Mr. Isak Sakai* (import-export of antiques); *Raul Garcia, M.D.* (doctor/therapist); *Jung Gil Choi, C.P.A.* (tax accountant)). The Board has not quantified what "significant" portion of foreign-speaking clients justifies business necessity, but it is usually between 80 and 90 percent (*Tel-Ko Electronics*, 88-INA-416 (July 30, 1990) (*en banc*); *Chris and Cary Enterprises*, 88-INA-134 (Sept. 3, 1991)), although it has been as low as 20 to 30 percent (*Mr. Isak Sakai, supra)*. The Board has also held that where the employer is credible and offers evidence that at least a significant portion of its clients are foreign speaking, it need not document that they comprise a particular percentage. *Raul Garcia, M.D., supra.*

In rebuttal, the Employer stated that 95% of its customers are Armenian and the majority of them do not speak English (AF 15). The Employer provided an invoice written in English that shows a purchase from Armenian Teletime (Employer stated that this invoice represents a purchase of advertising), and a subscription renewal notice from "Armenian Life Weekly" which is written part in Armenian and part in English (AF 27-28). The Employer also provided copies of 13 invoices from High Class furniture written in English and sold to individuals with Eastern European/Armenian sounding surnames (AF 30-42).

The invoice and the magazine subscription only show that the Employer has subscribed to an Armenian-subject magazine, and has purchased something from an Armenian Company. They do not document the percentage of the business that requires the Armenian language, or that the language is required to perform the job duties in a reasonable and effective manner. See *Coker's Pedigreed Seed Co., supra.* The 13 invoices with Eastern European/Armenian sounding surnames also do not document the business necessity of the foreign language requirement. See *Ace-Tech Auto*, 93-INA-484 (July 26, 1994). These invoices do not show that these customers prefer to do business in Armenian, will only do business in Armenian, or what percentage of the Employer's total business is represented by the invoices. See *Coker's Pedigreed Seed Co., supra*; *Western Electric Supply Company*, 94-INA-248 (Nov. 7, 1995); *Prestige Cars Corp.*, 88-INA-351 (July 17, 1989).

In *Mr. Isak Sakai, supra*, the Board found that the employer had documented that 20 to 30 percent of its import-export contacts preferred to communicate in Farsi. In *Raul Garcia, M.D., supra*, the Board found that the employer had documented a significant portion of his patients' preference to speak in Spanish, when the employer provided over 100 billing statements from Spanish-surnamed patients. In *Jung Gil Choi, C.P.A., supra,* the Board found

that the employer had documented that the Korean language is used extensively in mailings to clients by providing "translated statements and advertisements given to the clients which describe tax information and tax application forms."

Although an employer's statements must be considered, here, the Employer has provided no advertisements, fliers, or customer affidavits of any kind to support its statements. See *Raul Garcia, M.D., supra*; *Coker's Pedigreed Seed Co., supra*. The Employer's rebuttal evidence does not provide any kind of specific information regarding the total number of clients, what percentage of those clients only can speak Armenian, the total number of employees, the number of Armenian-speaking employees, how the Employer has dealt with, and is currently dealing with the Armenian-speaking segment of its business. In addition, the Employer has not established that the foreign language requirement has a direct bearing on the nature of its business of selling furniture. See *Mr. Isak Sakai, supra*; *Raul Garcia, M.D., supra*; *Jung Gil Choi, C.P.A., supra*; *Western Electric Supply Company, supra*. Without some supporting documentation, the statements by the Employer are merely unsupported assertions and conclusions, and cannot carry the Employer's burden of proving business necessity. See *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*); *Our Lady of Guadalupe School*, 88-INA-313 (June 2, 1989); *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989); *Tri-P's Corp.*, 87-INA-686 (Feb. 17, 1989).

We find that the Employer has not adequately documented the business necessity of the language requirements of Armenian, and thus, has failed to rebut the CO's finding of a violation pursuant to 20 C.F.R. § 656.21(b)(2)(i). The CO's denial of labor certification is, therefore, proper. As certification has been denied on this issue, the issue of the Alien failing to provide current employment information on the ETA 750 application need not be addressed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of July, 1996, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final

decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.